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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967.

## No. 1182

DONALD UELMEN AND PURE MILK PRODUCTS COOPERATIVE,

*Petitioners,*

*vs.*

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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ORVILLE FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on December 21, 1967.

### OPINIONS BELOW.

The district court gave an opinion officially reported at 267 F. Supp. 842. The transcript of this opinion is included in the opinion attached hereto (App. 16). The court of appeals, in a split decision, affirmed the order of the district court and is included in the appendix attached hereto (App. 13).

## JURISDICTION.

This is a suit arising under the Argicultural Marketing Agreement Act, 7 U. S. C. 608c, including subsections (3), (4), (13b) and (18); and the Administrative Procedure Act of 1946, 5 U. S. C. Sections 1003(a) and (b).

The date of the judgment which petitioners seek to have reviewed is December 21, 1967. The jurisdiction of this court is invoked under Title 28, Section 1254(1) of the United States Code.

## QUESTIONS PRESENTED.

1. Did the majority of the Court of Appeals for the Seventh Circuit err in holding that these petitioners, on behalf of 9,000 dairy farmers, lacked standing to maintain suit challenging an amendment of a federal milk order without a hearing?

2. Whether the action of the Secretary of Agriculture was valid in changing a federal milk order by adding the words "minus 24 cents" to the Milwaukee Order, without notice and without a hearing?

## STATUTES AND REGULATIONS INVOLVED.

The provisions involved being lengthy, the citation of the pertinent statutes is herewith set forth, with the pertinent text set forth in the appendix.

Agricultural Marketing Agreement Act of 1937, as amended; 7 U. S. C. 608c, including subsections (3), (4) and (18). These require notice and opportunity to be heard in amendment proceedings affecting price in federal milk orders. The Administrative Procedure Act, 5 U. S. C. Section 1003 (a) and (b), requiring notice and hearing as required by the basic statute.

The order of the Secretary of Agriculture of April 8, 1966, "minus 24 cents", 31 Fed. Reg. 5685, applied to federal milk order regulating the handling of milk in the Milwaukee, Wisconsin marketing area, Federal Register April 26th and May 8, 1962, 7 C. F. R. Chap. 10, 1039, including Sections 1039.51 and 1039.54 of said Milwaukee Order.

## STATEMENT OF THE CASE.

Pure Milk Products Cooperative is a Wisconsin cooperative with milk of certain of its members sold to handlers regulated by the Milwaukee Milk Marketing Order. Plaintiff, Donald Uelmen, a producer shipping milk to a milk handler in Milwaukee, is also Vice President of the Cooperative.

The Secretary of Agriculture issued an order regulating the handling of milk by handlers (milk dealers for the most part) for Milwaukee, Wisconsin.

This order was issued in 1950 (15 Fed. Reg. 6598), after due notice and a hearing as required by the Administrative Procedure Act (5 U. S. C. Section 1003), and the Agricultural Market Agreement Act of 1937 (7 U. S. C. Section 608c (3), (4) and (18)).

This order was amended from 1950 from time to time thereafter. In each case, up until April 8, 1966, the amendment was issued after due notice and was given an opportunity to be heard and the receipt of substantial evidence, with amendments issued upon substantial evidence introduced at such hearing.

On April 8, 1966, the Assistant Secretary signed an order headed "Determination of Equivalent Prices for Use in Computing Prices for Class I Milk". This was published in the Federal Register on April 13, 1966, Wednesday, Volume 31, No. 71.

It is the contention of the petitioners that no notice was given as required by law, and, therefore, the order of April 8, 1966, as published April 13, 1966, was illegal as an amendment to the Milwaukee Order.

In the course of the first year, this amounted to a loss of approximately 2 million dollars to the dairy-farmer producers whose milk was regulated by the old Milwaukee Order plants.

## REASONS FOR GRANTING THE WRIT.

I. The holding of the Court below that an order of the Secretary of Agriculture, substantially affecting the rights of producers, may not be challenged in court by the producers directly conflicts with the decisions of the Supreme Court of the United States in *Stark* v. *Wickard,* 321 U. S. 288, 302-311 (1944), *Brannan* v. *Stark,* 342 U. S. 451 (1952), *Calhoun* v. *Freeman,* 316 F. (2d) 386 (1963), Court of Appeals for the District of Columbia, and *Blair* v. *Freeman,* 370 F. (2d) 229 (December, 1966), no cert. taken (Court of Appeals for the District of Columbia).

After reviewing these cases, Circuit Judge Kiley summarized in his dissenting opinion:

> "Because the Secretary's alleged violation of the act denied producers rights which are granted under the act, they have standing to assert the alleged illegality of the federal courts."

The Department of Agriculture, with uncommon vigor for a farmer oriented agency of the government, has consistently over the years opposed any right of producers to challenge any act of the Secretary in milk orders. The position of the Secretary of Agriculture is that farmers have no standing, since they have no loss, in spite of the loss of two million dollars the first year after the operation of this amendment.

II. The holding of the Court below that an amendment of the Milwaukee Order could be issued without due notice and without an opportunity to be heard is in direct conflict with the clear language of the statutes involved, as interpreted by the Court of Appeals for the District of Columbia in *Blair* v. *Freeman,* 370 F. (2d) 229, 235 (1966),

and the Supreme Court in *Lehigh Valley Co-op. Farmers, Inc.* v. *United States,* 370 U. S. 76, 97-98 (1962); *Brannan* v. *Stark,* 342 U. S. 451, 456-462 (1952).

An amendment to a federal milk order, fixing prices, to be issued only after due notice and opportunity for hearing, as set forth in subsection (18), and notice of hearing is required in all hearings, as required in subsections (3) and (4) of the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. Section 608c.

**Plaintiffs' Standing to Sue.**

The Trial Court held that *Benson* v. *Schofield* was controlling. *Benson* v. *Schofield,* 236 F. (2d) 719, Court of Appeals for District of Columbia (1956), cert. denied 352 U. S. 976 (1957). This case is distinguishable. The milk producers brought an action against the Secretary of Agriculture to enjoin him from promulgating or making effective that part of his order which would extend the limits of the Greater Boston Market Area to reach and include milk distributed and sold to certain named towns.

In *Benson* v. *Schofield,* the Secretary published the notice of hearing to the effect that he was going to expand the marketing area, and, therefore, expand the effect of the Boston Order; the hearing was held, evidence was taken, and petitioners as dairy farmers participated at the hearing, substantial evidence was introduced, a finding was made by the Secretary as to the necessity of expansion of the Boston Order.

The Circuit Court of Appeals for the District Court of Columbia stated:

> "The order of the Secretary is final . . . subject to review only as the Act provides . . ."

To this citation, there is Footnote 14 which states:

> "As to the circumstances under which other relief may be available, see *Stark* v. *Wickard.*"

Petitioners in this case request the Court to bring this case within the terms of *Stark* v. *Wickard.*

**Notice and Opportunity To Be Heard.**

The dairy farmers in Wisconsin, as American citizens, should assume that their rights will not be affected without notice and opportunity to be heard in all cases where the statute grants the right to be heard after notice. The statutes so provide, both as to the Administrative Procedure Act and the Agricultural Marketing Agreement Act of 1937.

The District Court in effect held that the amendment "minus 24 cents" of 1966 actually had been approved by the dairy farmers in 1950. The theory of the Trial Court was that this was an equivalent price rather than an amendment.

As the United States Court of Appeals for the District of Columbia stated in *Blair* v. *Freeman,* 370 F. (2d) 229 at 237, calling a rose by any other name does not change the plant.

> "Calling the nearby differential the 'location' adjustment does not establish its permissibility."

The technique used by the Secretary in this present case and adopted by the District Court, and approved by the majority in the Circuit Court of Appeals of the Seventh Circuit, was stricken in the case of *Lehigh Valley Co-op. Farmers, Inc.* v. *United States,* 370 U. S. 76 at page 98.

If this was a price change or price increase, it was an amendment, and, therefore, notice and opportunity to be heard was required. It was no secret that the spokesman for the Secretary of Agriculture in this case resisted the action on the ground that this would have raised prices 24 cents, and this was not warranted.

Therefore, the whole case, involving millions of dollars,

turns on the semantics of the words "minus 24 cents" as to whether this continues prices in Milwaukee at the same level or lowered prices or raised prices. In resisting this action, Mr. Herbert L. Forest, Director of the Dairy Branch, United States Department of Agriculture, who was in charge of the regulations, by affidavit on several occasions stated that the issue is not the particular mechanics for determining Class I prices but whether, under the statute, a Class I price increase of 24 cents is warranted under the Milwaukee Order. He also stated there was no basis for an increase in prices in the Milwaukee Order.

His affidavit, his position and statements were ignored by the Trial Court and by a majority of the Circuit Court of Appeals. However, all courts and all judges would have to agree that, had this been a price increase or a price decrease, a public hearing would have been required.

## CONCLUSION.

Plaintiffs had standing to sue.

1. The April 6, 1966 order of the Secretary of Agriculture lowered the price of milk to handlers in the Milwaukee marketing area 24 cents. In the course of a year, this amounted to a loss of 2 million dollars approximately to the dairy farmer producers whose milk is regulated by the old Milwaukee order plants.

The plaintiffs claim the order of the Secretary of Agriculture was illegal in that it was issued without notice and opportunity to be heard without substantial evidence as required by the Administrative Procedure Act and the Agricultural Marketing Agreement Act of 1937.

The Department of Agriculture claimed and the District Court for the Eastern District of Wisconsin decided that even though the order of April 18, 1966, of the Secretary of Agriculture was illegal, even though the order cost the

dairy farmers approximately 2 million dollars for a year that the dairy farmers could not challenge such order.

The District Court claimed it lacked jurisdiction to examine into the merits of whether or not the plaintiffs had standing to sue.

We respectfully submit that the United States Supreme Court in *Stark* v. *Wickard,* 321 U. S. 288, 64 S. Ct. 559 (1944), is authority to the contrary; the plaintiffs do have standing to sue under *Stark* v. *Wickard.*

The recent case of *Blair* v. *Freeman,* 370 F. (2d) 229 (November, 1966), is a decision from the same Appellate Court which decided *Benson* v. *Schofield,* 236 F. (2d) 719 (1957).

Please note that the United States Government did not file certiorari in the case of *Blair* v. *Freeman.*

2. The dissenting opinion of Circuit Judge Kiley sets forth the necessity for holding a hearing.

> "The change in the order is not a mere substitute for the Chicago referent into the Milwaukee Order for a temporary period during the emergency caused by the recision of the Chicago Order. The change is the substitution of a new factor, i.e., 'minus 24 cents', to be used instead of the Chicago referent, and the change is permanent unless the Milwaukee Order producers are given a hearing at which they might have the opportunity to rescind the order or the part in issue here."

The action of the Secretary in 1966 in issuing an amendment is based upon a hearing, he states, which was held in 1950. If this administrative hanky panky is countenanced, one might as well forget the requirements of notice and opportunity to be heard in the ordinary fair play provisions of administrative law, or are these requirements to be applied to the rest of the population but not to dairy farmers?

It is for these reasons that the petitioners pray that a writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX.

## PERTINENT STATUTES INVOLVED.

### Agricultural Marketing Agreement Act of 1937, as amended. 7 U. S. C. Section 608c(3), (4), (18).

(3) Notice and Hearing.

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of Sections . . . he shall give due notice of and opportunity for a hearing upon a proposed order.

(4) Finding and Issuance of Order.

After such notice and opportunity for a hearing, the Secretary of Agriculture shall issue an order if he finds and sets forth in such order upon evidence introduced at such hearing . . .

(18) Milk Prices.

. . . He shall fix prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter as the Secretary finds necessary, on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

### Administrative Procedure Act, 5 U. S. C. Section 1003(a)(b).

(a) . . . except where notice or hearing is required by statute . . .

(b) After notice required by this section . . .

REGULATIONS.

Amendment to Milwaukee Order dated April 8, 1966, published April 13, 1966, Federal Register, Volume 31, No. 71.

Chapter 10, Consumer & Marketing Service, Marketing Agreements and Orders; (Milk), Department of Agriculture . . . determination of equivalent prices for use in computing prices for Class I milk . . . (3) prices hereby determined to be equivalent to the prices no longer available are "minus 24 cents" in the application of . . . 1029, Milwaukee, Wisconsin.

Milk Order No. 39, Federal Register April 26 and May 8, 1962, 7 C. F. R., Chapter 10, milk in Milwaukee, Wisconsin marketing area, Section 1039.51 . . . (a) Class I milk price. The price for Class I milk shall be the basic formula price plus $1.08 through August-November . . . provided such Class I price shall be increased or decreased respectively 2¢ for each full percent that the adjusted supply-demand ratio computed pursuant to Part 1030 (Chicago) of this chapter is greater or less than 72% but shall not be increased or decreased more than 24¢, because of such adjusted supply-demand ratio.

Because the Chicago order was no longer in existence and there was no computation from Chicago to apply to Milwaukee, the Secretary used Section 1039.54, "Use of Equivalent Prices".

> "If, for any reason, a price quotation required by this order for computing class prices or for other purposes is not available in the manner described, the market administrator shall use a price determined by the Secretary to be equivalent to the price which is required."

Opinion of the Circuit Court of Appeals for the Seventh Circuit dated December 21, 1967:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

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DECEMBER 21, 1967

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Before MAJOR, *Senior Circuit Judge,* and CASTLE, and KILEY, *Circuit Judges.*

CASTLE, *Circuit Judge.* The plaintiffs-appellants brought this action in the District Court seeking to enjoin the Secretary of Agriculture from continuing in effect a determination of equivalent prices relating to the pricing of milk under the Milwaukee Milk Marketing Order (7 C. F. R. 1039). The District Court in a well-reasoned opinion, reported at 267 F. Supp. 842, held (1) plaintiffs lacked standing to maintain the suit, and (2) the action of the Secretary was valid and authorized under the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. 601 et seq., and entered an order dismissing the complaint. We agree with the reasoning of the opinion below, and we adopt the opinion as our own.

Accordingly, the order appealed from is affirmed.

AFFIRMED.

No. 16376

KILEY, *Circuit Judge,* dissenting.

I respectfully dissent. The Secretary concedes that if the change in the Milwaukee Order amended the formula included in that Order for the purpose of fixing minimum milk prices paid to producers by dairies, a hearing was required under the Agricultural Adjustment Act and the regulations promulgated thereunder before the amendment could take effect.[1]

---

1. 7 U. S. C. Sec. 608c and 7 C. F. R. Secs. 900.1-900.407.

The formula originally set up in the Milwaukee Order for establishing the minimum class I milk price consisted of three factors summarized by the district court in its opinion at 267 F. Supp. 842, 844, as follows:

> 1. The basic formula price (§ 1039.50) resulting from prices paid for manufacturing milk in Minnesota and Wisconsin adjusted to 3.5% butterfat basis at the rate of the butter price times 0.120;
>
> 2. To this add $1.08, $.68 or $.88 depending on the month involved (§ 1039.51(a)); and
>
> 3. Add or subtract the amount resulting from the supply-demand ratio computed under the Chicago Order (7 C. F. R. 1030) but not to exceed plus 24 or minus 24 cents (§ 1039.51(a)). In the event any of these pricing factors is not available, then § 1039.54 of the Order requires that the Secretary shall determine an equivalent pricing factor to be utilized in the price computation.

75% of the producers voted favorably on this Order.

After the Chicago Order was terminated by vote of the producers affected, thereby making the supply-demand ratio in factor (3) unavailable, the Secretary issued the Milwaukee Order before us. This Order substituted for the flexible figure dependent on the supply-demand ratio of "not to exceed plus 24 or minus 24 cents," the inflexible "equivalent" "minus 24 cents." The district court stated this was done because the Chicago factor had been "minus 24 cents" for more than five years and would have continued at that level had the Chicago Order not been terminated. No justification is offered for determining that "minus 24 cents" is the equivalent of "not to exceed plus 24 or minus 24 cents." Neither the provisions of the Act or the Order give authority to substitute a non-equivalent factor in the formula because of the five year use without holding the hearing required under 7 U. S. C. Sec. 608c.

The change in the Order is not a mere substitute of the Chicago referent into the Milwaukee Order for a temporary period during the emergency caused by the rescission of the Chicago Order. The change is the substitution of a new factor, *i.e.*, "minus 24 cents" to be used instead of the Chicago referent, and the change is permanent unless the Milwaukee Order producers are given a hearing at which they might have the opportunity to rescind the Order or the part in issue here.

The district court also decided to dismiss on the alternative ground that even if the change in the formula was an amendment which required a hearing, milk producers had no standing to object to the failure of the Secretary to hold such a hearing. The district court and the Secretary rely on *Benson* v. *Schofield,* 236 F. 2d 719, to support his holding. Appellants rely on *Stark* v. *Wickard,* 321 U. S. 288, and on *Blair* v. *Freeman,* 370 F. 2d 229, to support their argument in favor of standing. These cases are not in point, however, since they all involve attempts by producers to attack an action of the Secretary which affected the minimum price they would be paid for milk but did not violate any specific right given the producers under the Agricultural Adjustment Act. Here the producers allege that the Secretary failed to hold a hearing which the Act required him to hold. Upon the holding of such a hearing the producers, as interested parties, are entitled to present evidence. 7 C. F. R. Sec. 900.8(b). Moreover, before any amendment, proposed after a hearing, could take effect it would have to be approved by a vote of the producers. 7 U. S. C. Sec. 608c(8)(A) and (B). Because the Secretary's alleged violation of the Act denied producers rights which are granted under the Act they have standing to assert the alleged illegality in the federal courts.

In my opinion the district court judgment is wrong. I think the Secretary abused his discretion and exceeded

his authority. I would reverse and remand with directions to order the Secretary to conduct a hearing on the Order as amended and to give the producers an opportunity to vote on whether or not to continue in effect the Order issued. I would not grant the injunction sought since I believe that the Secretary could allow the present Order including the amendment to remain in effect pending the outcome of the hearing.

**DECISION OF THE UNITED STATES DISTRICT COURT, DATED MAY 19, 1967.**

UNITED STATES DISTRICT COURT.

* * (Caption—66-C-234) * *

OPINION AND ORDER.

This action was brought by a cooperative association of producers and a producer, Donald Uelman, who is a vice-president of said cooperative, to enjoin the Secretary of Agriculture from applying § 1039.54 of the Milwaukee Milk Marketing Order (7 C. F. R. 1039.54). The effect of plaintiffs' action would be to render ineffective the supply-demand adjustment factor of minus 24 cents in the Class I price computation of the Milwaukee Milk Order and thus increase said Class I price by 24 cents.

Defendant filed an answer to the complaint and also a motion to dismiss the action. An oral argument was had before the Court, at which plaintiffs appeared by their attorney, George St. Peter, and defendant by James B. Brennan, United States Attorney, through John C. Chernauskas, attorney, United States Department of Agriculture.

Plaintiffs contend that § 1039.54 of the Milwaukee Milk Order is invalid in that it allows the Secretary of Agri-

culture to determine, without a hearing, a price factor required in the computation of the Class I price which is equivalent to a similar factor contained in the Order and which is no longer available. Plaintiffs contend that §§ 608c(3), (4) and (18) of the Act require a public hearing to be held before a determination of an equivalent price factor can be made. Plaintiffs allege that if the Secretary had not replaced the price factor involved here with an equivalent, the Milwaukee Class I price would have increased by 24 cents per hundredweight of milk. Plaintiffs allege that the Secretary's action in replacing the price factor and preventing them from receiving the increased price is causing them irreparable damage.

Defendant contends that plaintiffs' complaint should be dismissed on the ground that plaintiffs, as producers, are not regulated by the Marketing Order and thus lack standing to contest a provision in the Marketing Order regulation. Defendant further contends that the complaint should be dismissed on the merits because the Secretary's determination of an equivalent price factor, without a hearing, is authorized by the Act and required by the Marketing Order. Defendant asserts that:

1. Section 609c(18) of the Act sets forth the basic criteria which the Secretary must apply in establishing the level of Class prices, and in establishing or changing such level of price the Secretary must do so on the basis of evidence received at a public hearing;

2. That § 608c(5)(A) of the Act states that the Secretary may fix, or provide a method for fixing, Class prices and that § 1039.54 of the Order, which requires the Secretary to determine an equivalent price factor, is an inherent and necessary method to maintain the Class I price level established under § 608c(18) of the Act; and

3. That in any event § 608c(7)(D) of the Act author-

izes provisions in the Order which are incidental and necessary to effectuate the terms and conditions of the Order and that a determination of such as involved here is necessary so that the Order, i.e., the Class I price level, may continue to operate when a factor necessary to the Class I price computation is not available.

## Background.

Plaintiff, Pure Milk Products Cooperative, is an association of producers, and the milk of certain of the cooperative's members is sold to handlers regulated by the Milwaukee Milk Marketing Order. Plaintiff, Donald Uelman, is a producer who is a vice-president of the cooperative. Neither Uelman, the cooperative, nor any of the cooperative's members are regulated by the Milwaukee Marketing Order.

Milk Marketing Order No. 39 (7 C. F. R. 1039), which regulates the handling of milk for the Milwaukee, Wisconsin, Milk Marketing Area, was issued by the Secretary of Agriculture in 1950 (15 Fed. Reg. 6598). As amended from time to time through the public hearing process, the Marketing Order has been effective without interruption since that date. From its inception, the minimum Class prices under the Order have been established under the authority contained in §§ 8c(5)(A) [7 U. S. C. A. § 608c(5)(A)] and 8c(18) [7 U. S. C. A. § 608c(18)] of the Act. In this connection the Secretary, pursuant to § 8c(5)(A), provided a method for fixing mimimum prices under the Order and pursuant to § 8c(18), established a level of minimum prices as will reflect the factors specified in that section, insure a sufficient supply of pure and wholesome milk for the marketing area and be in the public interest. The Marketing Order has thus operated uninterruptedly for a period of over sixteen years, and minimum Class prices

have always been fixed under the authority of §§ 8c(5)(A) and 8c (18) of the Act.

The Class I price provisions of the Milwaukee Order were based on evidence received at a public hearing and were placed in the Order after being favorably voted upon by more that 75% of the producers supplying the market.* The Milwaukee Class I price is computed by utilizing the several pricing factors set forth in the Order which are:

1. The basic formula price (§ 1039.50) resulting from prices paid for manufacturing milk in Minnesota and Wisconsin adjusted to 3.5% butterfat basis at the rate of the butter price times 0.120;

2. To this add $1.08, $.68 or $.88 depending on the month involved (§ 1039.51(a)); and

3. Add or subtract the amount resulting from the supply-demand ratio computed under the Chicago Order (7 C. F. R. 1030) but not to exceed plus 24 or minus 24 cents (§ 1039.51(a)). In the event any of *these pricing factors* is not available, then § 1039.54 of the Order requires that the Secretary shall determine an *equivalent pricing factor* to be utilized in the price computation.

On May 1, 1966, the Chicago Milk Order was terminated by vote of the producers serving the market. Accordingly, as of May 1, 1966, the Chicago supply-demand adjustment

* Under 7 U. S. C. § 608c(12), cooperative associations, such as plaintiff, are authorized to cast a block vote for its producer members. Plaintiff cooperative has cast a block vote for its members when amendments to the Milwaukee, Chicago, and other orders to which it markets milk were up for consideration.

The Milwaukee Order is an "individual handler pool" type of Order (7 U. S. C. § 608c(5) (B) (i)), and, therefore, the approval of three-fourths or more of the producers in that market is necessary before a federal milk order, or any amendment thereto, can become effective. The plaintiff cooperative represents approximately 30% of the producers whose milk is priced and pooled under the Milwaukee Milk Marketing Order and thus, through its vote, has the power to determine whether any amendment to the Milwaukee Order shall be made effective.

factor would no longer be available for use in computing the Milwaukee Class I price. In view of this, the Secretary, pursuant to § 1039.54 of the Milwaukee Order, issued an order on April 8, 1966, determining an equivalent supply-demand factor. The Chicago supply-demand factor had been at a level of minus 24 cents for more than five years and would have continued at the minus 24 cents level if the Chicago Order had remained in effect. In these circumstances, the Secretary determined that the equivalent factor should continue to be minus 24 cents. This resulted in a continuation of the existing level of the Milwaukee Class I price.

PLAINTIFFS LACK STANDING TO SUE.

The defendant has moved to have the Court reconsider its earlier determination that plaintiffs were proper parties to maintain this action. The Court has re-examined the positions of the parties and the authorities with respect to the question of standing to sue and is now of the opinion that the plaintiffs lack standing to sue.

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U. S. C. A. § 601 et seq. and milk orders issued thereunder impose regulations solely on handlers of milk. By its terms the Act expressly provides that no order issued thereunder shall be applicable to any producer in his capacity as a producer. 7 U. S. C. A. § 608c (13) (B).

As to persons who are regulated by milk marketing orders (handlers), such Act specifically provides an administrative proceeding subject to judicial review for the purpose of challenging the provisions of a marketing order of or any obligation thereunder. 7 U. S. C. A. § 608c(15)(A) and (B). Before a handler may seek judicial relief from the provisions of or obligations imposed under a marketing order, he must exhaust his administrative remedy before

the Secretary of Agriculture. *United States* v. *Ruzicka*, 329 U. S. 287 (1946). Plaintiffs as producers who are unregulated by the Act are given no greater status by the Act than the handlers who are regulated.

The decision of the Court of Appeals in *Benson* v. *Schofield*, 236 F. 2d 719 (D. C. Cir. 1956), cert. denied 352 U. S. 976 (1957), is controlling here upon the issue of jurisdiction. In that case, milk producers brought an action against the Secretary of Agriculture to enjoin him from promulgating or making effective that part of his order which would extend the limits of the Greater Boston Marketing Area to reach and include milk distributed and sold in certain named towns. The plaintiffs, like those in this action, claimed irreparable injury would result to them because the extension of the marketing area would result in lower returns to them. The Court of Appeals in reversing the lower court and in ordering the dismissal of the complaint said at page 722:

> "* * * appellees to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.' Mere loss of income in consequence of the action of Government or economic disadvantage, by itself, constitutes *damnum absque injuria* which does not confer standing. * * *"

Similarly, in *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527 (D. C. Cir. 1955), producers of milk brought an action against the Secretary of Agriculture challenging a marketing order and alleging as their injury that the blended price payable under the order was less than they might receive were it not for the provisions of said order.

In sustaining the lower court's dismissal of plaintiffs' complaint for lack of standing to maintain their action, the Court of Appeals said at page 529:

> "The decisions referred to make clear (1) that injury from lawful competition is *damnum absque injuria* and affords no standing to the party damaged to seek judicial relief therefrom, absent statutory aid to standing; (2) that competition otherwise lawful is not unlawful because made more injurious by governmental action assumed to be invalid, with possible exceptions not here relevant, so long as no legal right of the party injuriously affected is invaded, see *Tennessee Power Co.* v. *T. V. A., supra,* 306 U. S. at pages 139, 140, 59 S. Ct. at page 370; and (3) that no legal right of one in a situation comparable in all material respects to plaintiffs' is invaded by lawful competition that is facilitated by such governmental action, and thereby made more economically injurious than otherwise would be the case."

See also *Marietti* v. *Freeman* (D. R. I., Sept. 30, 1964), and *Independent Dairymen's Cooperative* v. *Freeman* (N. D. Texas, Oct. 27, 1964).

Plaintiffs seek to rely on *Stark* v. *Wickard,* 321 U. S. 288 (1944). This Court is of the opinion that such reliance is misplaced. The Court in *Calhoun* v. *Freeman,* 316 F. 2d 386 (D. C. Cir. 1963), rejecting application of the *Stark* case, summarized *Stark* in footnote 4 on page 388 as follows:

> "'* * * There, certain producers regulated by the Boston [milk marketing] order had a proprietary interest in the Government-administered settlement fund created by their sales, and were held to have standing to challenge unauthorized diversions from the fund. * * *'"

Here there is no proprietary interest of the plaintiffs involved. The crux of the allegations is that the Secretary acted contrary to the Act, and if the alleged improper action were corrected, the price of Class I milk would be increased 24 cents per hundredweight.

The holding of the *Stark* case was, at pages 308-309:

> "* * * It is because every dollar of deduction comes from the producer that he may challenge the use of the fund. The petitioners' complaint is not that their blended price is too low, but that the blended price has been reduced by a misapplication of money deducted from the producers' minimum price."

*Schofield, supra,* elaborates at page 723:

> "* * * We still come back to the proposition, as the *Stark* case points out, that absent '*justiciable individual* right,' * * * the detriment complained of is *damnum absque injuria.* In short, the public interest is paramount."

Here, plaintiffs are claiming that their price is too low, and therefore their claim is one rejected in *Stark* v. *Wickard, supra.*

Accordingly, the plaintiffs have no standing to maintain this action, and the defendant's motion to dismiss said complaint for want of jurisdiction must be granted.

Assuming Plaintiffs Do Have Standing to Sue,

THEY COULD NOT PREVAIL ON THE MERITS.

It is the position of the plaintiffs that the failure of the Secretary to give notice and hold a hearing prior to the entry of the order of April 8, 1966, in which he determined an equivalent pricing factor, violated the Administrative Procedure Act, 5 U. S. C. A. § 1003, and also violated the Agricultural Marketing Agreement Act of 1937, more particularly 7 U. S. C. A. §§ 608c (3), (4) and (18).

Defendant's position is that under the Act it is not necessary to give notice and hold a public hearing when the Secretary makes a determination of an equivalent pricing factor which allows the price to continue at the level

found, after notice and hearing, to be in accord with the standards of the Act.

In the light of the issue presented it is necessary to discuss the policy, procedures, and criteria for fixing prices which were set forth in the Act by Congress.

The policy of the Act is stated in § 602 (7 U. S. C. § 602):

> "It is declared to be the policy of Congress—
>
> "(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623 and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.
>
> "(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623 and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.
>
> • • • • •
>
> "(4) • • • to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c (2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices."

Congress, after stating the declared policy of the Act, then set forth the procedures to be applied by the Secretary in setting milk prices under a marketing order. Sections 608c (3) and (4) of the Act provide:

"(3) Notice and hearing.

"Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623 and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

"(4) Finding and issuance of order.

"After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623 and 624 of this title with respect to such commodity."

With regard to the price level of milk, Congress directed the Secretary to apply the following criteria (7 U. S. C. § 608c (18)):

"(18) Milk prices.

"The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or association of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available

supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices."

Congress also determined the provisions which should be included in a milk marketing order (7 U. S. C. §§ 608c (5) and 608c (7)). Note particularly § 608c (5) (A) which provides:

"(5) Milk and its products; terms and conditions of orders.

"In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, *or providing a method for fixing,* minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. * * *" (Emphasis added.)

Congress also determined that other order provisions may be necessary to the effective operation of the Order so § 608c(7)(D) provides for provisions:

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

An analysis of the above provisions of the statute reveals that Congress established a definite plan with regard to pricing milk under a milk order. This plan may be stated as follows:

1. The Secretary is required to ascertain and establish class price levels in accord with the policy objectives stated in the Act (7 U. S. C. § 608c(18)).

2. In ascertaining the appropriate class price level, the Secretary must provide due notice and hold a public hearing at which all interested parties have an opportunity to present evidence and views. Any resulting order or an amendment thereto must be based on the evidence received at such hearing (7 U. S. C. §§ 608c(3), (4), and (18)).

3. The marketing order must contain the relevant terms and conditions stated in the Act (7 U. S. C. §§ 608c(5) and (7)). As to prices, § 608c(5)(A) of the Act requires the Secretary to fix, *or provide a method for fixing,* Class prices.

Plaintiffs admit that, acting pursuant to the mandates of the Act, the Secretary held a public hearing relating to the Class I price level and, based on the evidence received, proposed certain amendments to the Milwaukee Order. After a favorable vote by more than 75% of the producers serving the market, those provisions were made a part of the Order and are in pertinent part as follows:

"§ 1039.50. Basic formula price.

"The basic formula price shall be the average price per hundredweight for manufacturing grade milk, f. o. b. plants in Wisconsin and Minnesota, as reported by the Department for the month: *Provided,* That such reported price shall be adjusted to a 3.5 percent

butterfat basis at the rate of the butter price times 0.120 and rounded to the nearest cent.

"§ 1039.51 Class prices.

"Subject to the provisions of §§ 1039.52 and 1039.53, the class prices per hundredweight for the month shall be as follows:

"(a) *Class I milk price.* The price for Class I milk shall be the basic formula price for the preceding month plus $1.08 August through November; $0.68 March through June and $0.88 in other months: *Provided,* That such Class I price shall be increased or decreased, respectively, 2 cents for each full percent that the adjusted supply-demand ratio computed pursuant to Part 1030 (Chicago) of this chapter is greater or less than 72 percent, but shall not be increased or decreased more than 24 cents because of such adjusted supply-demand ratio.

"(b) *Class II milk price.* The Class II milk price shall be the basic formula price for the month.

* * * * *

"§ 1039.54 Use of equivalent prices.

"If for any reason, a price quotation required by this order for computing class prices or for other purposes is not available in the manner described, the market administrator shall use a price determined by the Secretary to be equivalent to the price which is required."

Plaintiffs allege that § 1039.54 of the Order requires the Secretary to determine an equivalent "Class I price." As this Court reads this section, it clearly shows that it pertains to equivalent price *factors* utilized in the *computation* of the Class I price.

The provisions in the Order which provide the "method for fixing" Class prices were placed in the Order as a result of the public hearing process. As to such order provisions, the public hearing process resulted in the establishment of factors critical to the establishment of a Class I price level satisfying the standards of § 608c(18)

of the Act. The public hearing further provided means for providing any of the critical price factors when for any reason one might become unavailable and in this way assured continuation of the appropriate Class price level.

Additionally, § 1039.54 of the Order which provides for such determinations is authorized under § 608c(7)(D) of the Act as necessary and incidental to effectuate the pricing provisions of the Order, since such determinations are necessary to allow the price provisions of the Order to operate when one of the factors making up such price is unavailable. In the absence of this provision the proper price could not be computed.

This Court is of the opinion that the Act authorizes the Secretary to establish a method for fixing prices; that the Milwaukee Order, entered after notice and hearing, embodies such a method; that the method provides for the use of equivalent prices; and that when the Chicago Order terminated, the Secretary properly determined an equivalent for the supply-demand adjuster, thereby maintaining the price for Class I milk at the level at which it had previously existed under the Chicago Order. Notice and hearing were not required for this determination under the method for fixing prices in the Milwaukee Order.

For the foregoing reasons,

It Is Ordered that plaintiffs' complaint must be and it is hereby dismissed.

Dated at Milwaukee, Wisconsin, this 19th day of May, 1967.

JOHN W. REYNOLDS,
*U. S. District Judge.*